IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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DEBBIE TAYLOR,	)	Civil No: 2:03-CV-124 J
Plaintiff,	)	**MEMORANDUM OPINION & ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
vs.	)	
SMITH'S FOOD & DRUG CENTERS, INC.,	)	
Defendant.	)	

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On January 1, 2003, Plaintiff Debbie Taylor ("Taylor") filed the instant action against defendant Smith's Food & Drug Centers Inc. ("Smith's"), alleging violations of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 (2000), specifically lost wages, lost employment benefits and other compensation.

On February 12, 2004, defendant Smith's filed their motion and memorandum for summary judgment, ("Defendant's Motion") dated 02/12/04 (dkt. no. 15); and (Defendant's Memo") dated 02/12/04 (dkt. no. 16), respectively. On March 31, 2004, Taylor filed her opposition to defendant's motion ("Plaintiff's Opposition") dated 03/31/04 (dkt. no. 20). Smith's filed its Reply April 12, 2004 ("Defendant's Reply") dated 04/12/04 (dkt. no. 21).

On April 26, 2004, defendant's motion came before the Court for hearing, at

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which time the Court took the matter under advisement.[1] (Minute Entry, dated 4/26/04 (dkt. no. 23).) The Court grants defendant's motion for summary judgment based on the following:

FACTUAL HISTORY

Since August 1996, Taylor was employed in the Bakery for Smith's. (*See Complaint*, dated January 31, 2003.) Beginning in April 2002, Taylor states that she began experiencing depression and anxiety. From July 17 - July 22, 2002, Taylor scheduled approved vacation time, ostensibly to deal with her condition. Upon request, Taylor was further excused by her supervisor, Soccorro Watts, to miss work from July 23 - July 27, 2002.

On July 25, 2002 (within the time of Taylor's excused absence), Ms. Watts called Taylor and left a message reminding Taylor to bring in a doctor's note excusing her absences. According to Taylor, the soonest that Taylor could get a Dr.'s appointment with her doctor Sumner McCallister was August 5th. But Taylor did not tell Ms. Watts this, nor did she request from Ms. Watts an extension of her excused

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[1]The Court took the matter under advisement in order to review several documents to be provided by counsel for Smith's. Smith's filed these documents in its Supplement to Summary Judgment Record, filed 04/28/04 (dkt. no. 24). The documents include: Plaintiff's Employee Termination Document; the Department of Workforce Services Employer Response Form; an example of Smith's Application for Family and Medical Leave of Absence (in triplicate); and a copy of USDOL WH-380, Application of Health Care Provider.

absence up to and including August 5th.

From July 28 - August 5, 2002, Taylor did not show up to work, nor did she attempt to contact anyone at Smith's during this time.

Smith's has a 'no call/no show' policy for its employees which states: " [i]f you are absent for two consecutive days without notifying your department manager or supervisor, the absence will be interpreted as voluntary resignation from the company." (*See* Smith's Employee Handbook, attached as Exhibit B to Defendant's Memo, at 27.) In furtherance of their 'no call/no show policy,' Smith's initiated Taylor's termination on August 3, 2002 by Store Director Debra Robinson, "effective July 27, 2002"- which was the last day of her excused absence.

On Monday, August 5, 2002, Taylor's daughter, Tammi Dennison, called Smith's requesting FMLA leave, on behalf of her mother. Taylor's termination had been submitted and was awaiting final approval by the Human Resources director that same day. On August 16, 2004 Smith's terminated Taylor "effective July 27, 2002."

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 247 (1986); *Russillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir. 1991).

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. *Viktus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991)). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that there are genuine issues for trial. *Viktus,* at 1539 (citing *Matsushita Elec. Indus. Co. v. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991)). A "material fact" is one that might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. To constitute a genuine factual dispute, there must be more than a scintilla of evidence that is significantly probative in establishing the fact. *Viktus,* 11 F.3d at 1539.

In applying the summary judgment standard, the court construes the factual record and reasonable inferences in the light most favorable to the party opposing summary judgment. *Blue Circle Cement, Inc. v. Bd. of County Comm'rs.*, 27 F.3d 1499, 1503 (10th Cir. 1994); *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991).

ANALYSIS

Defendant Smith's argues that summary judgment should be granted for three reasons: 1) Taylor did not give the required notice; 2) she was not entitled to FMLA leave because 7 days before the request was made through her daughter, she had voluntarily resigned; and 3) there is no causal connection between Taylor's request for FMLA leave and the commencement of her termination proceedings. In other words, the fact that Taylor's termination had been initiated by Smith's before Taylor requested FMLA leave precludes any causal connection between the FMLA request and her termination.

Taylor argues that summary judgment should be denied because Smith's did have notice of her depression and anxiety. She supplements the facts to detail this notice: On July 2000, Taylor informed Deb Robinson, manager that she wanted to step down as bakery manager because she had enough stress in her life. Smith's agreed to let her step down so she became a cake decorator. On July 22, 2002, Ms. Watts witnessed Taylor crying; Taylor explained she was dealing with problems at home and was depressed. She asked for time off to deal with her problems and depression. On July 22, 2002, Taylor's husband called Ms. Watts telling her that Taylor couldn't work that day. On the night of July 22, 2002, Ms. Watts called Taylor at home. Taylor indicated she needed to take a week or more off. Ms. Watts said she could take the rest of the week off through July 27th or 28th.

Notably, the Tenth Circuit recently decided a case similar to the present case, *Shirley J. Bones v. Honeywell International, Inc.*, Case No. 02-3378 (10th Cir. decided April 23, 2004). In *Bones*, the Plaintiff alleged violations of the FMLA[2] because the Defendant deemed her to have voluntarily terminated her employment when she neither reported to work nor notified her supervisor or team of her absences on three consecutive working days in violation of company policy. As in the present case, the Defendant moved for summary judgment on all claims. As to the FMLA claims, the *Bones* district court held, and the Tenth Circuit affirmed that Plaintiff Bones did not provide the proper notice for leave under the FMLA; and that Defendant Honeywell would have dismissed Bones regardless of her request for an FMLA leave because she failed to comply with its notification of absence policy.[3]

This Court similarly finds. It is undisputed that from July 28th to August 5th (when Taylor's daughter called Smith's on her behalf), Taylor did not show up or attempt to contact Smith's. Then again from August 6th to August 12th, Taylor did not call in to Smith's to explain her absence; nor did she or anyone on her behalf explain the delay in picking up the FMLA forms.

Taylor was not a new employee to Smith's. She had worked for the company for

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[2]In addition to FMLA, Plaintiff Bones also alleged violations of the Americans with Disabilities Act, and Kansas state law.

[3]Plaintiff Bones only appealed the district court's grant of summary judgment on the first ground. Thus, she waived her right to appeal the alternate ground upon which the district court based its summary judgment on her FMLA claim.

16 years. She admits that she is aware of the "no call/no show" policy. And although she speculates that this company policy was not always enforced, there is simply no factual footing to indicate that it was never enforced. The no call/no show policy is reasonable, and the Court gives deference to Smith's observance of this policy.

Taylor did not provide proper notice for leave under the FMLA.

Furthermore, as to Taylor's claim for FMLA interference, the Court does not find from the evidence in the record that Taylor's termination was related to her request for FMLA leave. As stated in Taylor's termination document, Taylor was terminated because she did not comply with Smith's absence policy. In other words, she would have been terminated for her absences irrespective of whether or not these absences were related to a requested medical leave under FMLA. *See Bones*, at 16*; see also McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1108 (10th Cir. 2002) (no interference if the employee would have been terminated in the absence of the FMLA request or leave.)

For the foregoing reasons,

IT IS ORDERED that Defendant's Motion for Summary Judgment is hereby **GRANTED**, and the above-captioned proceeding, **DISMISSED**.

DATED this 28 day of June, 2004.

BY THE COURT

BRUCE S. JENKINS
United States Senior District Judge

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United States District Court
for the
District of Utah
June 29, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00124

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Steven C. Bednar, Esq.
MANNING CURTIS BRADSHAW & BEDNAR LLC
THIRD FLOOR NEWHOUSE BLDG
10 EXCHANGE PL
SALT LAKE CITY, UT 84111
EMAIL

Mr. David J Holdsworth, Esq.
9125 S MONROE PLAZA WAY STE C
SANDY, UT 84070
JFAX 9,5679960